A

Lee Hark Lam & Ors v Kebun Rimau Sdn Bhd & Anor

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–346–02 OF 2014
IDRUS HARUN, ZAMANI A RAHIM AND ROHANA YUSUF JJCA
3 AUGUST 2016

C

Evidence — Standard of proof — Civil fraud case — Whether trial judge misdirected himself on standard of proof to apply — Whether respondents pleaded elements of fraud and conspiracy — Whether respondents to discharged standard of proof beyond reasonable doubt

D

Trusts and Trustees — Breach of trust — Fiduciary duty — Appeal — Scheme to fraudulently divert three of nine parcels of land from first respondent — Whether there was fiduciary relationship between first appellant and first respondent — Whether fiduciary duty only limited to six parcels of land — Whether appellants acted against interest of first respondent — Whether there was conspiracy to commit fraud — Whether appellants acted for personal benefit — Constructive trust — Whether Merpati Bernas and second and third appellants constructive trustees of three parcels of land following breach of fiduciary duty by first appellant — Limitation — Whether respondents' action time-barred — Whether appellate intervention necessary

E

F

Kebun Rimau Sdn Bhd ('the first respondent') was one of many companies collectively known as the Gaya Group, which was owned by Tan Sri Harris bin Mohd Salleh ('Tan Sri Harris'), the former Chief Minister of Sabah, and his family. Tan Sri Harris was desirous of buying nine parcels of land in the district of Beaufort ('the nine parcels of land'), which were owned by the Khoo family at the material time. Lee Hark Lam ('the first appellant') had been appointed by Tan Sri Harris to act as the middleman between the Khoo family and Tan Sri Harris in the purchase of the lands. Tan Sri Harris had also entrusted one Diana Lai, his personal assistant ('the PA'), and one Lau Siew Chiang, a former longtime employee of the Gaya Group ('Lau') to work jointly with the first appellant to negotiate and complete the purchase of the nine parcels of land. The first appellant, the PA and Lau ('the fiduciaries') led Tan Sri Harris to believe that the Khoo family did not want to deal directly with the potential buyers of the nine parcels of land. Thus, the fiduciaries suggested that Prosper Lane Sdn Bhd ('the second respondent'), which unknown to Tan Sri Harris consisted of the first appellant's marketing team, should be the corporate special purpose vehicle through which the nine parcels of land could be purchased and then later sold to the first respondent. Thus, the second respondent was purchased by the first respondent and became a subsidiary of

G

H

I

the first respondent. The fiduciaries then informed Tan Sri Harris that the Khoo family had decided to exclude three of the nine parcels of lands, namely the Merpati Lands and the Trust Land, from the sale. Later, the fiduciaries engineered the first respondent to pay for all the nine parcels of land before hatching a scheme to fraudulently divert the Merpati Lands and the Trust Land from the first respondent to themselves for their personal benefit. This they did by incorporating Merpati Bernas Sdn Bhd, a company in which the first appellant and two other former HSBC staff were shareholders, and using that company to park their stolen assets. The first appellant then caused the Trust Land to be transferred to himself and finally to his two sons ('the second and third appellants') for free. The respondents later discovered that that they had been deceived by the fiduciaries. The respondents thus filed a suit against the fiduciaries for recovery of the sum of RM1,910,616.35, being the balance of monies held by the lawyers as stake holders in connection with the purchase of the lands; against the second and third appellants for the recovery of the Trust Land; and against Merpati Bernas for the recovery of the Merpati Lands. The trial judge found the fiduciaries to have acted in concert to cause the Merpati Lands and the Trust Land to be diverted to Merpati Bernas and then subsequently the Trust Land to the appellants. Thus, judgment was entered in favour of the respondents. Dissatisfied with the decision of the High Court the appellants and Merpati Bernas had filed their respective appeals against the decision of the High Court. This judgment was in respect of both these appeals, which involved the same parties and same common core of facts. The appellants submitted that the trial judge had misdirected himself on the standard of proof. According to the appellants, the respondents had pleaded elements of fraud and conspiracy against them and as such the trial judge should have applied the standard of beyond reasonable doubt and not balance of probabilities. The appellants also argued that the trial judge had erred in law and in fact by holding that the respondents' action was not time-barred.

Held, dismissing both appeals with costs of RM35,000 and RM10,000 respectively:

(1) Contrary to the appellants' allegations the respondents' cause of action as disclosed in the statement of claim was clearly for breach of fiduciary duties and not for fraud masquerading as breach of fiduciary duties. In any case, even if the respondents might have pleaded fraud or conspiracy to commit fraud, the trial judge had correctly held that the standard of proof that the respondents had to discharge was on a balance of probabilities. The Federal Court had recently re-stated the law and held that in civil fraud cases the standard of proof is the civil standard of balance of probabilities (see paras 22–23).

(2) It had clearly been established in evidence that the first appellant had clearly put himself in a fiduciary relationship with the first respondent, when he accepted the appointment as agent to act for and on behalf of the

first respondent in the purchase of the Khoo family's lands. Further, the fact that there was no direct dealing between the Khoo family and the first respondent had put the appellant clearly in the most important and dominant position to deal with any buyer. As a fiduciary, the law imposed on the first appellant strict duty in his legal relationship with the first respondent, who was his principal for the specific purpose of acquiring the Khoo family's lands. However, the appellants failed to adduce any evidence to prove that the first appellant either had the right or was duly authorised by the Khoo family to exclude the Merpati Lands and the Trust Land from the sale to the first respondent. The evidence also showed that the first respondent had paid the purchase price of RM19,560,000 for the nine parcels of land. Thus, the trial judge was correct in finding that the first appellant owed the fiduciary duty to ensure that the first respondent would have received all the nine parcels of land (see paras 24–28 & 34–39).

(3) Based on the evidence the first appellant was clearly in breach of his fiduciary duty as he had not only failed to protect the first respondent's interest but had deliberately acted against the first respondent's interest by fraudulently diverting to Merpati Bernas the Merpati Lands and the Trust Land that the first respondent had paid for. Further, the first appellant's assertion that his fiduciary duty was only limited to the six parcels of land which had purportedly been discharged when the first respondent had received the six parcels of land was groundless and wholly unmeritorious. The trial judge had rightly found that the first appellant's printed note to the PA and Lau on how to engineer the diversion of the Trust Land from the first respondent showed the first appellant to be the mastermind of this fraudulent scheme. The printed note also corroborated the evidence of Tan Sri Harris that he had been led to believe by the fiduciaries that the Trust Land had been excluded from the sale and purchase. In the circumstances, there was no merit in the appellants' argument that the trial judge had failed to properly evaluate and consider the evidence (see paras 41–43 & 45–48).

(4) The evidence had clearly shown that the purchase price for the nine parcels of land amounting to RM19,650,000 was wholly paid from the funds belonging to the first respondent but the first respondent had ended up with only six parcels of land. As such, the trial judge was correct to have awarded the Merpati Lands and the Trust Land to the respondents and there was clearly no error in the trial judge's findings. Further Merpati Bernas was not a bona fide purchaser for value of the Merpati Lands and the Trust Land as the same were transferred to Merpati Bernas due to breach of fiduciary duties by the first appellant and the other fiduciaries. Since Merpati Bernas had not obtained good title to these lands they could not have legally transferred the Trust Land to the first appellant. Consequently, the first appellant could not transfer any

good title of the Trust land to the second and third appellants. As such, the trial judge was correct in finding that the second and third appellants as well as Merpati Bernas were constructive trustees holding the lands on trust for the first respondent (paras 50–51 & 54).

(5) The trial judge was also correct to award to the respondents, damages of RM1,910,616.35 as it was supported by the evidence adduced at the trial (see para 61).

(6) The trial judge had correctly construed and concluded that the respondents' action was governed by Item 97 s 3 of the Limitation Act, which prescribed that the period for limitation was six years with the period to begin to run when the right to sue accrues. Hence the date when the respondents became aware that the Merpati Lands and the Trust Land did not remain with the Khoo family and that the first appellant had in breach of his fiduciary duties diverted the Trust Land from the first respondent was when the time began to run. Based on the evidence the respondents' cause of action was well within the limitation period of six years. (see paras 62–63).

(7) There was a proper judicial appreciation of the evidence adduced in the present case and the appellants' grounds of appeal were without merits. As such, there was no legal basis to set aside the judgment of the High Court (see paras 65–66).

[Bahasa Malaysia summary

Kebun Rimau Sdn Bhd ('responden pertama') merupakan salah satu daripada beberapa syarikat yang dikenali secara kolektif sebagai Gaya Group, yang dimiliki oleh Tan Sri Harris bin Mohd Salleh ('Tan Sri Harris'), bekas Ketua Menteri Sabah, dan keluarganya. Tan Sri Harris ingin membeli sembilan bidang tanah di daerah Beaufort ('sembilan bidang tanah'), yang dimiliki oleh keluarga Khoo pada masa yang material. Lee Hark Lam ('perayu pertama') telah dilantik oleh Tan Sri Harris untuk bertindak sebagai orang tengah antara keluarga Khoo dengan Tan Sri Harris dalam pembelian tanah-tanah itu. Tan Sri Harris juga telah mengamanahkan kepada Diana Lai, pembantu peribadinya ('pembantu peribadi'), dan Lau Siew Chiang, bekas pekerja yang telah lama berkhidmat di Gaya Group ('Lau') untuk bekerjasama dengan perayu pertama untuk berunding dan melengkapkan pembelian sembilan bidang tanah itu. Perayu pertama, pembantu peribadi dan Lau ('fidusiari') telah meyakinkan Tan Sri Harris untuk mempercayai bahawa keluarga Khoo tidak mahu berurusan secara terus dengan bakal pembeli sembilan bidang tanah itu. Justeru itu, pihak fidusiari tersebut telah mencadangkan supaya Prosper Lane Sdn Bhd ('responden kedua'), yang tanpa pengetahuan Tan Sri Harris terdiri daripada pasukan pemasaran responden pertama, hendaklah menjadi instrumen khas korporat yang dengannya sembilan bidang tanah itu dapat dibeli dan kemudiannya dijual kepada responden pertama. Justeru,

responden kedua telah dibeli oleh responden pertama dan menjadi syarikat subsidiari kepada responden pertama. Pihak fidusiari kemudiannya telah memaklumkan kepada Tan Sri Harris bahawa keluarga Khoo telah memutuskan untuk mengecualikan tiga daripada sembilan bidang tanah itu, iaitu Tanah Merpati dan Tanah Amanah, daripada jualan itu. Kemudian, pihak fidusiari telah menguruskan supaya responden pertama membayar bagi kesemua sembilan bidang tanah itu sebelum melancarkan suatu skim untuk mengalihkan secara fraud Tanah Merpati dan Tanah Amanah daripada responden pertama kepada diri mereka sendiri untuk kepentingan peribadi. Mereka lakukan ini dengan menggabungkan Merpati Bernas Sdn Bhd, sebuah syarikat di mana perayu pertama dan dua bekas pekerja HSBC merupakan pemegang syer, dan menggunakan syarikat tersebut untuk meletakkan aset yang dicuri. Perayu pertama kemudiannya telah menyebabkan Tanah Amanah dipindahkan kepada dirinya dan akhirnya kepada dua orang anak lelakinya ('perayu kedua dan ketiga') dengan percuma. Pihak responden kemudiannya mendapati bahawa mereka telah ditipu oleh pihak fidusiari. Lalu pihak responden memfailkan saman terhadap pihak fidusiari bagi mendapatkan semula wang sejumlah RM1,910,616.35, yang merupakan baki wang yang dipegang oleh peguam sebagai pemegang amanah berkaitan dengan pembelian tanah-tanah itu; terhadap responden kedua dan ketiga bagi mendapatkan semula Tanah Amanah; dan terhadap Merpati Bernas bagi mendapatkan semula Tanah Merpati. Hakim bicara telah mendapati bahawa pihak fidusiari telah bertindak secara bersesama untuk menyebabkan Tanah Merpati dan Tanah Amanah dialihkan kepada Merpati Bernas dan selanjutnya mengalihkan Tanah Amanah kepada perayu. Justeru, penghakiman yang memihak kepada responden telah diputuskan. Tidak berpuas hati dengan keputusan Mahkamah Tinggi itu, perayu dan Merpati Bernas telah memfailkan rayuan masing-masing terhadap keputusan Mahkamah Tinggi. Penghakiman ini adalah berkenaan dengan kedua-dua rayuan ini, yang melibatkan pihak dan fakta asas yang sama. Perayu menghujahkan bahawa hakim bicara telah tersalah arah berhubung dengan standard pembuktian. Menurut perayu, pihak responden telah menghujahkan bahawa terdapat elemen fraud dan konspirasi terhadap mereka dan oleh kerana itu, hakim bicara sepatutnya mengguna pakai standard melampaui keraguan munasabah dan bukan atas imbangan kebarangkalian. Perayu juga menghujahkan bahawa hakim bicara telah terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa tindakan responden tidak terhalang oleh had masa.

Diputuskan, menolak kedua-dua rayuan dengan kos sebanyak RM35,000 dan RM10,000 masing-masing:

(1) Bertentangan dengan tuduhan perayu, kausa tindakan responden sebagaimana yang dizahirkan dalam penyata tuntutan responden adalah jelas untuk pelanggaran kewajipan fidusiari dan bukan untuk fraud bertopengkan pelanggaran kewajipan fidusiari. Dalam apa-apa kes,

sekalipun responden menyatakan tentang fraud atau konspirasi untuk melakukan fraud, hakim bicara telah dengan betul memutuskan bahawa dalam suatu kes fraud sivil, standard pembuktian ialah pada standard imbangan kebarangkalian sivil (lihat perenggan 22–23).

(2) Ia telah dibuktikan dengan jelas dalam keterangan bahawa perayu pertama telah meletakkan dirinya dalam suatu hubungan fidusiari dengan responden pertama, apabila dia menerima pelantikan sebagai ejen untuk bertindak untuk dan bagi pihak responden pertama dalam urusan pembelian tanah keluarga Khoo. Tambahan lagi, fakta bahawa tiada urusan secara terus antara keluarga Khoo dengan responden pertama telah dengan jelas meletakkan perayu pada kedudukan yang paling penting dan dominan untuk berurusan dengan mana-mana pembeli. Sebagai seorang fidusiari, undang-undang mengenakan kewajipan yang ketat ke atas perayu pertama dalam hubungan perundangannya dengan responden pertama, yang merupakan prinsipalnya, dengan tujuan khusus untuk mendapatkan tanah keluarga Khoo. Walau bagaimanapun, perayu telah gagal mengemukakan apa-apa keterangan untuk membuktikan bahawa perayu pertama telah sama ada mempunyai hak atau telah dibenarkan dengan sewajarnya oleh keluarga Khoo untuk mengecualikan Tanah Merpati dan Tanah Amanah daripada penjualan kepada responden pertama. Keterangan juga menunjukkan bahawa responden pertama telah membayar harga belian berjumlah RM19,560,000 untuk sembilan bidang tanah tersebut. Oleh itu, hakim bicara adalah betul apabila memutuskan bahawa perayu pertama mempunyai tanggungjawab kewajipan fidusiari untuk memastikan responden pertama akan menerima kesemua sembilan bidang tanah itu (lihat perenggan 24–28 & 34–39).

(3) Berdasarkan kepada keterangan, perayu pertama telah dengan jelas melanggar kewajipan fidusiarinya apabila dia bukan sahaja telah gagal untuk menjaga kepentingan responden pertama tetapi dengan sengaja telah bertindak bertentangan dengan kepentingan responden pertama dengan mengalihkan secara fraud Tanah Merpati dan Tanah Amanah yang telah dibayar oleh responden pertama kepada Merpati Bernas. Tambahan lagi, penegasan yang dibuat oleh perayu pertama bahawa kewajipan fidusiarinya terhad kepada enam bidang tanah yang dikatakan telah dilaksanakan apabila responden pertama telah menerima enam bidang tanah itu adalah tidak berasas dan langsung tidak bermerit. Hakim bicara telah dengan betul memutuskan bahawa nota bercetak oleh perayu pertama kepada pembantu peribadi dan Lau tentang bagaimana untuk melaksanakan pengalihan Tanah Amanah daripada responden pertama menunjukkan bahawa perayu pertama merupakan dalang kepada skim fraud ini. Nota bercetak tersebut juga menyokong keterangan Tan Sri Harris bahawa beliau telah diyakinkan oleh pihak fidusiari untuk mempercayai bahawa Tanah Amanah itu telah

dikecualikan daripada jual beli tersebut. Dalam keadaan itu, hujahan perayu bahawa hakim bicara telah gagal untuk menilai dan mempertimbangkan keterangan dengan sewajarnya adalah tidak bermerit (lihat perenggan 41–43 & 45–48).

(4) Keterangan telah dengan jelas menunjukkan bahawa harga belian sembilan bidang tanah yang berjumlah sebanyak RM19,650,000 itu telah dibayar sepenuhnya daripada dana yang dimiliki oleh responden pertama tetapi akhirnya responden pertama hanya mendapat enam bidang tanah sahaja. Oleh itu, hakim bicara adalah betul untuk mengaward Tanah Merpati dan Tanah Amanah kepada responden dan adalah jelas tidak terdapat kekhilafan dalam dapatan oleh hakim bicara. Tambahan lagi, Merpati Bernas bukanlah seorang pembeli bona fide dengan nilai bagi Tanah Merpati dan Tanah Amanah memandangkan kedua-dua tanah itu telah dipindah milik kepada Merpati Bernas akibat pelanggaran kewajipan fidusiari oleh perayu pertama dan fidusiari yang lain. Oleh kerana Merpati Bernas tidak mendapat hakmilik yang sempurna kepada tanah-tanah ini, mereka tidak mungkin dapat memindah milik Tanah Amanah kepada perayu pertama secara sah. Akibatnya, perayu pertama tidak dapat memindah milik apa-apa hakmilik yang sempurna Tanah Amanah itu kepada perayu kedua dan ketiga. Oleh yang demikian, hakim bicara adalah betul apabila memutuskan bahawa perayu kedua dan ketiga termasuklah Merpati Bernas merupakan pemegang amanah konstruktif yang memegang tanah-tanah itu sebagai amanah bagi responden pertama (lihat perenggan 50–51 & 54).

(5) Hakim bicara juga adalah betul untuk mengaward kepada responden, ganti rugi sebanyak RM1,910,616.35 sebagaimana yang dibuktikan melalui keterangan yang dikemukakan semasa perbicaraan (lihat perenggan 61).

(6) Hakim bicara telah mentafsir dan merumus dengan betul bahawa tindakan responden ditadbir oleh perkara 97 s 3 Akta Had Masa, yang menetapkan bahawa tempoh had masa ialah enam tahun dengan tempoh tersebut bermula apabila hak untuk menyaman berlaku. Oleh yang demikian, tarikh apabila responden menyedari bahawa Tanah Merpati dan Tanah Amanah tidak berada pada keluarga Khoo dan perayu pertama telah, melanggari kewajipan fidusiarinya, mengalihkan Tanah Amanah daripada responden pertama merupakan tarikh permulaan pengiraan tempoh masa tersebut. Berdasarkan kepada keterangan, kausa tindakan responden berada dalam tempoh had masa enam tahun tersebut (lihat perenggan 62–63).

(7) Terdapat pengiktirafan kehakiman yang sepatutnya terhadap keterangan yang dikemukakan dalam kes ini dan alasan rayuan perayu adalah tidak bermerit. Oleh yang demikian, tidak terdapat asas perundangan untuk

mengenepikan penghakiman oleh Mahkamah Tinggi (lihat perenggan 65–66).]

Notes

For a case on fiduciary duty, see 12(2) *Mallal's Digest* (5th Ed, 2015) para 2987.
For cases on standard of proof in general, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 2967–2980.

Cases referred to

APV Hill & Mills (M) Sdn Bhd v AQ-Pacific Wide Sdn Bhd & Anor [2006] 3 MLJ 235, CA (refd)
Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)
Asean Securities Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301, FC (refd)
Boardman and another v Phipps [1966] 3 All ER 721, HL (refd)
Bristol and West Building Society v Mothew; (t/a Stapley & Co) [1996] 4 All ER 698, CA (refd)
Foskett v McKeown and others [2001] 1 AC 102, HL (refd)
Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1 MLJ 773; [2015] 1 CLJ 719, FC (refd)
JCT Ltd v Muniandy Nadasan & Ors and another appeal [2016] 6 MLJ 621; [2016] 3 CLJ 692, CA (folld)
Reading v R [1949] 2 KB 232, CA (refd)
Regal (Hastings) Ltd v Gulliver and Others [1942] 1 All ER 378, HL (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (folld)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2) [2010] 2 MLJ 181; [2010] 1 CLJ 381, FC (refd)
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265; [1997] 2 CLJ 607, CA (folld)

Legislation referred to

Limitation Ordinance (Cap 72) s 3, Schedule, Items 72, 77, 97

Appeal from: Suit No KK-22–153 of 2011 (High Court, Kota Kinabalu)

Marina Tiu (Lim Pitt Kong with her) (PK Lim & Co) for the appellants.
Douglas Lind (Nicholas KF Chong with him) (Lind Willie Wong & Chin) for the respondents.

Idrus Harun JCA (delivering judgment of the court):

PRELIMINARIES

[1] For convenience, we heard this appeal together with Civil Appeal No S-02–388–02 of 2014 ('the second appeal') as they arose from one civil action in the court below under Suit No KK-22–153 of 2011. Both appeals were therefore related and involved the same parties besides the same common core of facts. We propose to give reasons for our decisions with respect to both appeals in one common judgment. The appeals concern three fiduciaries namely the first appellant, Diana Lai and Lau Siew Chiang ('the first and second defendants' in the court below), who were found to have been in breach of their fiduciary duties for having abused their positions of trust and confidence, by hijacking and diverting three parcels of land known as the Merpati Lands and the Trust Land out of the nine parcels of land that they were entrusted to purchase for the first respondent. The transaction was transacted in the most unusual manner in that the actual buyer and seller never met directly. Instead, the transaction was entirely and exclusively in the hands of the first appellant, Diana Lai and Lau Siew Chiang to undertake and complete it for the first respondent qua the purchaser. It was from this unusual and unique position that the first appellant, working in concert with Diana Lai and Lau Siew Chiang had hatched up a fraudulent scheme to divert from the transaction the Merpati Lands and the Trust Land. Unlike the usual land scams which are committed by the use of forged transfer documents and legal instruments, the scam here was distinctly most creative. It was executed by manipulating the transaction through web of deceptions and corporate manoeuvres to give the impression that the transfer of the Merpati Lands and the Trust Land to Merpati Bernas Sdn Bhd, the sixth defendant in the court below ('Merpati Bernas') was, legal and above board. Hence the first respondent only became aware that they had been deceived of the Merpati Lands and the Trust Land almost six years later when in February 2011, it was discovered that the seventh defendant namely Makinsa Sdn Bhd was seen building shophouses and not residential homes on part of the Trust Land.

[2] We may necessarily mention at this point that in the High Court, the respondents as plaintiffs commenced the above-mentioned suit against:

(a) the first, second and third appellants in this appeal, inter alia, for a breach of fiduciary duty and recovery of the sum of RM1,910,616.35;

(b) the second and third appellants in this appeal for the recovery of the Trust Land;

(c) Merpati Bernas in the second appeal for the recovery of the Merpati Lands; and

(d) the seventh defendant in the court below namely Makinsa Sdn Bhd for the disgorgement of profits paid to the second and third appellants.

[3] On 14 February 2014, the learned High Court judge had found the first appellant, Diana Lai and Lau Siew Chiang, in breach of their fiduciary duties and in furtherance of their deceitful act, diverted the Merpati Lands and the Trust Land to Merpati Bernas. The High Court further found that the Trust Land was later diverted to the first appellant and then to the second and third appellants, the two sons of the first appellant. The learned judge had also held that Merpati Bernas was holding as constructive trustee, the Merpati Lands for first respondent and that the second and third appellants were holding the Trust Land as constructive trustees also for the first respondent.

[4] The learned judge thus allowed all of the respondents' claims as prayed against all the appellants, Diana Lai, Lau Siew Chiang and Merpati Bernas save the seventh defendant which had entered into a consent judgment with the respondents on 9 January 2012.

[5] The appeals before us were brought by the appellants against the High Court's decision in allowing the respondents' claims. We shall refer to the appellants in this appeal as the first, second and third appellants and the appellant in the second appeal as Merpati Bernas and collectively, they shall be referred to as the appellants. It is noteworthy that the first and second defendants in the court below did not appeal against the High Court's decision. For the purpose of this judgment both of them shall be respectively referred to as Diana Lai and Lau Siew Chiang.

SUMMARY OF EVIDENCE

[6] The evidence that can be discerned from the record of the proceedings reveals that PW1, namely Tan Sri Harris bin Mohd Salleh ('Tan Sri Harris') who is the former Chief Minister of Sabah and is currently a businessman, together with his family, own many companies. These companies are collectively known as the Gaya Group. The first respondent, namely Kebun Rimau Sdn Bhd, a member of the Gaya Group, is also owned by the family of Tan Sri Harris. The second respondent viz Prosper Lane Sdn Bhd is a subsidiary company of the first respondent. The first respondent purchased the second respondent because Tan Sri Harris was allegedly led to believe by the first appellant, Diana Lai and Lau Siew Chiang that it was owned by the Khoo family and that it would be the corporate special purpose vehicle through which the Khoo family's lands could be purchased. Diana Lai was Tan Sri Harris' personal assistant for 37 years and meanwhile Lau Siew Chiang was a former longtime employee of the Gaya Group. At the material time, Lau Siew Chiang worked for Sejati Sdn. Bhd. which was also a member of the Gaya

Group. The first appellant was a former HSBC senior manager. As the uncontroverted fact has unmistakeably shown, the first appellant acted as the middleman between the Khoo family and Tan Sri Harris. The story began circa May 2003, when Tan Sri Harris directed Diana Lai to arrange for the purchase of all nine parcels of the Khoo family's lands in the district of Beaufort. The said lands were held under the title deeds and with the total area as follows:

(a) CL 175173369 (The Woodford Estate)	– 5,158.31 acres
(b) CL 175128757	– 22.39 acres
(c) CL 175128775	– 0.49 acres
(d) CL 175004412	– 13.2 acres
(e) CL 175016314	– 237.97 acres
(f) CL 175029544	– 9.88 acres
(g) PL 176028337 (now CL 01756059288)	– 75 acres
(h) CL 175017660	– 9.24 acres
(i) PL 176137358	– 2,685.51 acres

[7] The dispute centred around these nine parcels of land ('the said lands'). The said lands were undisputedly owned by the Khoo family at the material time. The Khoo family comprised Cheng Chee Nooi @ Yuen See Choo, the executrix of the estate of Khoo Thau Chiang, the Director General of Insolvency of Malaysia ('DGI') for the estate of Khoo Thau Choon and John Khoo Cheo Ping ('PW2'), the administrator of his father's estate, namely Khoo Siak Chiew.

[8] To continue the narrative, Tan Sri Harris did not receive any news from Diana Lai until early 2005 about his intended purchase of the said lands. It was then that Diana Lai told Tan Sri Harris that the Khoo family did not wish to deal with potential buyers directly. They wanted negotiations to be conducted through an intermediary, namely the first appellant. Tan Sri Harris then nominated the first respondent to be the purchaser of the said lands. By a letter dated 11 May 2005 ('exh B(2)'), the first respondent appointed the first appellant as its agent to purchase the said lands. The fees of the first appellant was fixed at RM450,000. The first appellant accepted the appointment by signing on the copy of the said letter. It was in evidence that Tan Sri Harris entrusted Diana Lai and Lau Siew Chiang to work jointly with the first appellant to negotiate and complete the purchase of the said lands. The evidence led revealed that at a meeting arranged by Diana Lai, Tan Sri Harris was assured by the first appellant that the Khoo family would be selling all their lands to him except for the eight acres of the Woodford Estate as that piece of land had already been donated to the Beaufort Middle School.

[9] With this information, Tan Sri Harris had thereupon confirmed that he was proceeding with the purchase of the said lands except the eight acres of land

in question. However, as events transpired, the first appellant, Diana Lai and Lau Siew Chiang subsequently informed Tan Sri Harris that the Khoo family had decided to exclude the Merpati Lands which were held under the title deeds CL 175128757, CL 1750004412 and CL 175128775, as well as the Trust Land comprising 40.15 acres of the Woodford Estate which adjoined the eight acres of land meant for the Beaufort Middle School as the Khoo family wanted to retain them. The Trust Land of 40.15 acres would then be excised from the Woodford Estate as apparently, it had been earmarked for the construction of houses for former employees of the Khoo family. Tan Sri Harris was also told by the first appellant, Diana Lai and Lau Siew Chiang that the purchase of the remaining six parcels of the said lands had to go through the second respondent. Further, it was represented to Tan Sri Harris that the second respondent belonged to the Khoo family.

[10] It was little wonder that Tan Sri Harris was led to believe that the excluded lands comprising the Merpati Lands and the Trust Land would remain with the Khoo family. However, as events turned out, it was much later, in or around February 2011, that Tan Sri Harris discovered that the Khoo family did not build any houses for their ex-employees. The Trust Land had ended up with the second and third appellants who became the registered owners. He also discovered that 17 acres of the Trust Land was being developed by the construction of 420 shop lots by the seventh defendant. Tan Sri Harris also discovered that the Merpati Lands were registered in the name of Merpati Bernas. His daughter namely Halijah bt Harris ('PW8') reported to him that her inquiries revealed that the Khoo family had wanted to sell all the nine parcels of land to the first respondent, not six parcels of land as the first appellant had made it out to be, they did not have any plan to build any houses for their ex-employees and the second respondent did not belong to the Khoo family.

[11] PW2, namely Dato' John Khoo corroborated the evidence of Tan Sri Harris on material points. He confirmed that the Khoo family, of which he was a member, wanted to sell all the said nine parcels of land. The said lands were charged to the HSBC Bank at that time. Dato' John Khoo acted on behalf of the Khoo family in finding a purchaser for the nine parcels of land and to this end, as he knew the first appellant who once worked for HSBC Bank, he authorised the first appellant to find a buyer for the nine parcels of land at a price acceptable to him and HSBC bank. Dato' John Khoo disagreed with the claim by the first appellant that he did not want to get involved directly with interested purchasers. He said in 2005, the first appellant reported that Tan Sri Harris had through the first respondent made an offer to buyer all nine parcels of land for RM19.56m. Dato' John Khoo and HSBC Bank accepted the offer for the purchase of the nine parcels of land with the exception of the eight acres of land that was to be donated to Beaufort Middle School. Dato' John Khoo's

intention was to sell the nine parcels as one lot. He was advised by the first appellant that the best way to deal with the sale of the Khoo family's lands was to use a corporate special purpose vehicle. He agreed with the first appellant's advice that the sale should be conducted through the second respondent. After the sale of all the nine parcels of the said lands to the second respondent for which the Khoo family and the DGI received a total of RM19.56m, Dato' John Khoo no longer had anything to do with subsequent transactions of the second respondent.

[12] William Liaw Wah Fong ('PW3') was the solicitor who handled all the related transactions which led to the transfer of the nine parcels of land from the Khoo family to various parties in this case. He confirmed that the first respondent's money was used to pay the Khoo family for all nine parcels of land. William Liaw wore many hats. He not only acted for the Khoo family but also acted for the second respondent in respect of the sale and purchase agreements. He also acted for the first appellant in respect of the shares sale agreement and received a fee for it. In his evidence, William Liaw said that the sale transaction involving the said lands was so structured to have the lands sold and transferred to the second respondent first and then eventually to the first respondent. For this reason, his firm was also appointed to act for the second respondent. He was also appointed as the stakeholder who would receive payment from the first respondent. He acted on the instructions of the first appellant but he also kept Dato' John Khoo informed.

[13] In a letter dated 13 June 2005 ('exh B(9–11)') to Tan Sri Harris, William Liaw on behalf of the second respondent offered to sell six parcels of land subject to the successful completion of the transfer of the said lands from the Khoo family to the second respondent. It was stated in the said letter that the purchase price for the six parcels of land was RM21.96m. William Liaw said that after receipt of the purchase price from the first respondent, three sale and purchase agreements were executed on 23 August 2005 by the three estates of the Khoo family in respect of the sale of their shares in the nine parcels of land with the second respondent ('exhs B(53–66), (77–96) and (113–125)'). The purchase price stated in each of the three sale and purchase agreements was RM6.52m which totalled to RM19.56m. This amount was paid to the vendors through his law firm who acted as the stakeholder. William Liaw confirmed that the payment to the Khoo family and the DGI was made from the sum of RM22.21m that was deposited in his firm by the first appellant. He said that the first appellant had deposited the sum of RM22.21m to purchase 30,000 shares which is the entire paid up capital of the second respondent from its then shareholders, namely Wong Fui Fatt ('the deceased'), Chen Nam Kong @ John Tsen Nam Kong ('DW11') and Teo Lai Heong ('DW9'). The structures of the series of transactions involved the acquisition of the nine parcels of land for RM19.56m by the second respondent from the Khoo family and thereafter

only six parcels of land would be resold to the first respondent through the acquisition by the first respondent of all the issued shares in the second respondent from the three shareholders for RM22.21m. Of this sum, RM19.56m was utilised to pay the Khoo family. PW8, who was also the managing director of the first respondent testified that the first respondent had paid for the nine parcels of land.

[14] The first appellant, Diana Lai and Lau Siew Chiang in the meantime, arranged to procure Merpati Bernas as another corporate vehicle in order to park the stolen assets, that is the Merpati Lands and the Trust Land, once they had been transferred out of the second respondent. The first appellant then engineered his nominees namely Yusni @ Rusdie bin Alibasa ('PW7') and Thien Chee Wah to be appointed directors and shareholders of Merpati Bernas on 11 July 2005. Lau Siew Chiang also became a registered shareholder of one of the three issued shares of Merpati Bernas. PW7 in his evidence testified that he became a director and shareholder of one of the three issued shares of Merpati Bernas at the behest of the first appellant. PW7 it is to be noted was a taxi driver at the material time who once worked for HSBC Bank.

[15] After the first appellant and Lau Siew Chiang had taken control of Merpati Bernas, they had in furtherance of their fraudulent scheme engineered the following transactions:

(a) three sale and purchase agreements dated 23 August 2005 ('exhs B(53–66), (77–96) and (113–125)') were executed between the estate of the Khoo family's brothers and the second respondent for the nine parcels of land;

(b) a purported sale and purchase agreement dated 24 August 2005 ('exh C(356–371)') was also executed between the second respondent and Merpati Bernas for the sale and transfer of the Merpati Lands and Trust Land from the former to the latter;

(c) a shares sale agreement dated 11 November 2005 ('exh C(458–502)') was executed between the second respondent's three shareholders and the first respondent for the purchase of all the second respondent's shares by the first respondent thus indirectly acquiring the balance of the six parcels of land;

(d) a purported sale and purchase agreement dated 1 October 2008 ('exh E(263–272)') was executed between Merpati Bernas and first appellant for the transfer of the Trust Land to him;

(e) a further transfer of the Trust Land on 10 November 2009 ('exh D(662–665)') by the first appellant to his two sons namely the second and third appellants; and

(f) a sale and purchase agreement dated 28 June 2010 ('exh D(671–688)') was executed between the second and third appellants and the seventh respondent for the sale of 17 acres of the Trust Land in exchange for RM17m.

[16] The matter was then laid to rest for many years until February 2011 when the first respondent's representative namely PW11 noticed that shophouses were being built on the Trust Land. This sudden revelation unravelled the false impressions created by the first appellant, Diana Lai and Lau Siew Chiang. Immediately, Tan Sri Harris and the first respondent realised that they had been deceived by the first appellant, Diana Lai and Lau Siew Chiang all this while. The first respondent conducted an investigation and discovered that the original three shareholders of the second respondent were former HSBC Bank staff and that the shareholders of Merpati Bernas were two former HSBC Bank staff and Lau Siew Chiang.

[17] Following these discoveries the first and second respondents commenced this action under Suit K-22–153 of 2011 against:

(a) the first appellant, Diana Lai and Lau Siew Chiang for breach of fiduciary duty and for the recovery of the sum of RM1,910,616.35;

(b) the second and third appellants for the recovery of the Trust Land;

(c) Merpati Bernas for the recovery of the Merpati Lands; and

(d) the seventh defendant for the disgorgement of profits paid to the second and third appellants.

THE APPEALS

[18] These appeals raise several main issues. At the heart of the matter lies the question whether the learned trial judge had misdirected himself on the standard of proof to be applied to this case, whether the first appellant was a fiduciary of the first respondent and if he was, the material ancillary issue related thereto is whether there was a breach of the said fiduciary duty by the first appellant. These appeals also turn upon the question of limitation. Upon determination of all these main issues, we shall consider an ancillary issue put forward by the appellants when their learned counsel contended that the learned judge, in granting all the reliefs prayed for by the respondents, had acted mechanically without making due and proper enquiry.

STANDARD OF PROOF

[19] The appellants alleged that the learned judge misdirected himself on the standard of proof. The main bone of learned counsel's contention on this issue

was that as the respondents had pleaded elements of fraud and conspiracy against the first appellant, Diana Lai and Lau Siew Chiang, the correct standard of proof that the learned judge should have applied was beyond reasonable doubt and not balance of probabilities. The appellants relied on *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 and *Asean Securities Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301 in support of their contention.

[20] We would, in dealing with this issue, begin by observing that the learned judge had determined that the standard of proof the respondents were required to discharge was balance of probabilities. The cause of action of the respondents, as the learned judge had correctly stated, was pleaded in para 15 of the statement of claim which was undoubtedly breach of fiduciary duties owed by the first appellant, Diana Lai and Lau Siew Chiang when they conspired and hatched up a scheme to fraudulently divert the Merpati Lands and the Trust Land from the first respondent to themselves and for their personal benefits to the detriment of the first respondent. Particulars of such breach were disclosed in the succeeding paras 16 and 17 of the statement of claim which the learned judge had reproduced in his grounds of judgment. Elsewhere in the statement of claim, the respondents had also pleaded the breach of fiduciary duties in paras 23, 26, 27, 28, 30, 31 and 32 thereof.

[21] From a correct reading of the pleadings, it is evidently clear that the elements of conspiracy and fraud were merely used in the context of the alleged breach of fiduciary duties to describe the actions of the first appellant, Diana Lai and Lau Siew Chiang in their dishonest dealings with the Khoo family's lands that the first respondent was purchasing. The word 'conspired' wherever it appears in the statement of claim is merely intended to indicate or to show that there was some agreement between the first appellant, Diana Lai and Lau Siew Chiang in a scheme to divert the Merpati Lands and the Trust Land from the first respondent. Whereas the word 'fraudulently' when read with the other relevant part of the statement of claim is intended to convey the message that the first appellant, Diana Lai and Lau Siew Chiang had been dishonest with whatever actions they undertook.

[22] The respondents had in fact sought to show that it was the fraudulent acts by the first appellant, Diana Lai and Lau Siew Chiang that had caused them to be in breach of their fiduciary duties owed to the first respondent. This is to be found in paras 16, 17, 19, 20, 21, 26, and 28 of the statement of claim. All these paragraphs ought not to be read or construed in isolation as this would give rise to misconceived allegation or proposition that the respondents pleaded cause of action is for fraud but have instead to be read together with para 15 of the statement of claim. The use of the words 'had conspired to fraudulently divert from the first respondent ...' to reiterate our point, are

intended to convey the message that the first appellant, Diana Lai and Lau Siew Chiang agreed to dishonestly divert the Merpati Lands and the Trust Land from the first respondent. This stated dishonest and wrongful act by them is pleaded as the basis of the respondents' claim against them for breach of their fiduciary duties but not however as the cause of action against them per se. Thus, for the reasons stated above and contrary to the appellants' allegation, the respondents' cause of action as disclosed by the statement of claim is clearly for breach of fiduciary duties and not for fraud masquerading as breach of fiduciary duties.

[23] Notwithstanding the above conclusion, we would like to emphasise the point that even if the appellants' submission is correct, the learned judge had nevertheless correctly determined that the applicable standard of proof the respondents had to discharge was on a balance of probabilities. The Federal Court had recently re-stated the law and held that in civil fraud cases the standard of proof is the civil standard of balance of probabilities. The Federal Court in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584 said:

> [49] It is this; that at law there are two standards of proof, namely beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases. As such, even if fraud is the subject in a civil claim, the standard of proof is on the balance of probabilities. There is no third standard. And, neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts.
>
> Hence, it is therefore up to the presiding judge, after hearing and considering the evidence adduced as being done in any other civil claim to find whether the standard of proof has been attained. 'The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies'. The criminal aspect of the allegation of fraud and the standard of proof required thereof should be irrelevant in the deliberation.
>
> We therefore reiterate that we agree and accept the rationale *In re B(Children)* that in a civil claim even where fraud is alleged the civil standard of proof, that is on the balance of probabilities, should apply. And perhaps it is not out of place here to restate the general rule of common law that 'in the absen ce of statutory provision to the contrary, proof of civil proceedings of facts amounting to commission of a crime need only be on balance of probabilities.
>
> Accordingly, despite the reaffirmation of the law on the issue in *Yong Tim v Hoo Kok Chong* we hold that it is no longer the law in this country. Similarly the principles as pronounced in *Ang Hiok Seng* and *Lee You Sin v Chong Ngo Khoo* applying the civil standard to a certain extent are also no longer the law. Hence, the disapproval of *Lau Kee Ko* in *Ang Hiok Sng* is no longer relevant'.

It does not matter therefore, even if, as the appellants had alleged, the respondents might have pleaded fraud or conspiracy to commit fraud, the

learned judge had correctly held that the standard of proof that the respondents were required to discharge to prove their claim was on the balance of probabilities. We are mindful of the fact that the Federal Court in *Sinnaiyah* had made it clear that the judgment only applied to that appeal and to future cases, we nevertheless consider the phrase 'future cases' covers an on-going appeal such as the present appeals before us. We find support in this premise in the Court of Appeal's decision in *JCT Ltd v Muniandy Nadasan & Ors and another appeal* [2016] 6 MLJ 621; [2016] 3 CLJ 692 which decided that the words 'future cases' encompassed an on-going appeal. Therefore, as far as these appeals are concerned we are duty bound to apply the law as it presently stands.

WHETHER THE FIRST APPELLANT WAS A FIDUCIARY OF THE FIRST RESPONDENT

[24] The learned trial judge found that the first appellant was a fiduciary of Tan Sri Harris and the first respondent. Being in a fiduciary relationship with the first respondent, the first appellant had a fiduciary duty to ensure that the first respondent received what they had paid for. This was clearly evident by the fact that the first appellant was entrusted by the first respondent's letter dated 11 May 2005 ('exh B(2)') with the task to the purchase of 8446.31 acres of land at Beaufort. The first appellant had indicated his acceptance of the task entrusted to him at the professional fees of RM450,000 in his own hand writing in the said letter itself. Thus by accepting the task entrusted to him to purchase the 8446.43 acres of land at Beaufort for the first respondent, the first appellant had clearly put himself in a fiduciary relationship with the first respondent. There is an abundance of authority which describes this kind of relationship as one that would come within the ambit of a fiduciary relationship. Millet LJ in *Bristol and West Building Society v Mothew; (t/a Stapley & Co)* [1996] 4 All ER 698 at p 711 said:

> A fiduciary is someone who had undertaken to act for or on behalf of another in a particular matter in circumstances which give to a relationship of trust and confidence.

[25] In *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265; [1997] 2 CLJ 607, this court had referred to a passage from *Reading v R* [1949] 2 KB 232 as follows:

> A consideration of the authorities suggest that for present purpose a fiduciary relation exists (a) whenever the plaintiff entrusts to the defendant property, including tangible property as, for instance confidential information, and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorised by him and not otherwise ... and (b) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for the benefit, and relies on the defendant to procure for the plaintiff the best terms available.

In *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719 the Federal Court said:

> For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or to advance the interest of another.
>
> This is perhaps the most obvious of the characteristics of the fiduciary office for equity will only oblige a person to act in what he believes to be another's interest if he himself assumed a position which requires him to act for or on behalf of that other in some particular matter. Thus, the essential element is that there must be some undertaking on the part of a fiduciary to act with loyalty in the interest of the other party. A fiduciary is someone who had undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.

[26] We may mention in this regard that the appellants admitted in para 43 of their written submission that the fiduciary relations between the first appellant and the first respondent had arisen from the first appellant's acceptance on his appointment as an agent on 11 May 2005. However, they alleged that the said letter had appointed the first appellant to purchase only six parcels of land and Tan Sri Harris agreed to purchase the six parcels of lands for RM22.21m. However, the issue as to how many parcels of land that the first appellant had agreed to purchase for the first respondent is irrelevant in order to determine whether the first appellant was a fiduciary of the first respondent. Contrary to the appellants' allegation, the learned judge had correctly determined the characteristics of a fiduciary as defined by Millet LJ in *Bristol and West Building Society v Mothew; (t/a Stapley & Co)* [1996] 4 All ER 698, before His Lordship proceeded to consider whether the first appellant was a fiduciary of the first respondent. The learned judge had found that the first appellant was a fiduciary of the first respondent because the first appellant did not deny that he had accepted his appointment as an agent of the first respondent for the purchase of the Khoo family's lands. This is similar to the solicitor in *Gurbachan Singh Bagawan Singh v Vellasamy Pennusamy*. The Federal Court had held that as the solicitor had agreed to act for the purchasers in the estate land that was being auctioned, the solicitor was clearly in a fiduciary relationship with the purchasers, as he had bound himself in some way, to protect or advance the interest of the purchasers. The learned judge had also found that the first appellant was acting as the agent of the first respondent because the documentary evidence showed that the first appellant had played a very active and dominant role in the acquisition of the Khoo family's lands by the first respondent.

[27] Learned counsel for the appellants cited the case of *Tengku Abdullah*, before this court contending that the learned judge erred when he did not apply

the accepted tests to determine whether the appointment gave rise to a fiduciary relationship and that he failed to see that the evidence presented fell far short of the requirements. At this point, it is of some significance to observe that the learned judge had not applied *Tengku Abdullah*'s case because the appellants did not bring this case to his attention in the court below. It is before this court that the appellants cited this case for the first time. This issue moreover, is not even part of the appellants' stated grounds of appeal in their memorandum of appeal. Nevertheless, it does not escape our notice that the Court of Appeal in the *Tengku Abdullah*'s case, did not postulate that a fiduciary relationship 'must' but rather it merely said that it 'seem to possess' the three general characteristics stated therein. This is what the Court of Appeal said in held [3a]:

> Relationship in which a fiduciary obligation have been imposed seem to possess three general characteristics, namely (i) the fiduciary has scope for the exercise of discretion or power (ii) the fiduciary can unilaterally exercise that power or discretion so as not affect the beneficiary's legal or practical interests (iii) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

In our opinion, the characteristics of a fiduciary is not only defined by the *Tengku Abdullah*'s case but also other leading case authorities such as *Bristol and West Building Society v Mothew, Gurbachan Singh Bagawan Singh v Vellasamy Pennusamy*, *Regal (Hastings) Ltd v Gulliver and Others* [1942] 1 All ER 378 and *Boardman and another v Phipps* [1966] 3 All ER 721.

[28] However, contrary to the appellants' contention, the three general characteristics defined in the *Tengku Abdullah*'s case were nevertheless overwhelmingly present in the present suit. We begin by stating that, first and foremost, it is not in dispute that there was no direct dealing between the first respondent and the Khoo family. The direct dealing was between the first respondent and the first appellant. It is to be recalled that Tan Sri Harris was made to believe that the Khoo family did not wish to deal directly with potential buyers. This had thus put the first appellant clearly in the most important and dominant position to deal with any buyer. This unique and important position gave the first appellant wide discretion over the transaction. The first appellant's dominant role in this transaction was amply demonstrated by his own witness statement in the following passages:

(a) in answer to Q14, he said that after having consulted Dato' John Khoo and William Liaw he decided to sell the 48 acres portion of CL 175173369 (Woodford Estate parcel) to his marketing Team namely Wong Fui Fatt, Chen Nam Kong ('DW11') and Teo Lai Heong ('DW9') as that was the best and surest course to ensure the transfer of the eight acres to Beaufort Middle School;

(b) in answer to Q15, he stated that the Merpati Lands were taken out because of the presence of squatters, which purportedly caused price resistance and gave a negative perception to potential buyers; and

(c) in answer to Q18, he said that to overcome the complicated and problematic ownership issue it was decided to employ the second respondent as 'special purpose vehicle' to hold the Merpati Lands and the 48 acres portion of CL 175173369.

[29] Next, William Liaw the solicitor in charge of the sale transaction had also confirmed of the active and prominent role played by the first appellant viz:

(a) in his witness statement:

(i) in answer to Q6 and Q7(f), he said that it was the first appellant who had instructed him to have the sale to the first respondent be transacted through the second respondent;

(ii) in answer to Q7(a), he said that it was on the instruction of the first appellant that he issued the letter of 13 June 2005 offering on behalf of the second respondent to sell to Tan Sri Harris the six parcels of land totalling 8,446.43 acres;

(b) during cross-examination by Diana Lai's counsel, William Liaw said that the first appellant discussed with him and Dato' John Khoo about the various problems relating to selling the lands. That it was the first appellant who had suggested using the second respondent as the special purpose vehicle to overcome the purported problems;

(c) he had testified that it was the first appellant together with Wong Fui Fatt ('the deceased') and Dato' John Khoo who had authorised various payments made to the various recipients viz:

(i) the two payments to Chin Khian Kong for RM250,000 and RM276,000;

(ii) the eight payments to individuals totalling RM1,115,616.35; and

(iii) the seven payments on the account of Wong Fui Fatt ('the deceased'), Teo Lai Heong ('DW9') and Chen Nam Kong ('DW11').

[30] Chin Khiam Kong ('PW5') had stated in his witness statement (paras 18 and 19) that after he had sorted out the valuation of the lands as requested by the DGI, the first appellant told him that the first appellant would submit the name of the second respondent as the buyer of the nine parcels of land to the DGI. PW5 had also stated that the first appellant told him that Tan Sri Harris had agreed to buy the nine parcels of land. It is therefore abundantly

clear that the first appellant's own evidence, and that of William Liaw and PW5 conclusively proved that the first appellant had the power and discretion over the transaction. Further, the fact that the first appellant could decide that:

(a) the transaction between the first respondent and the Khoo family be transacted through the second respondent;

(b) the Merpati Lands and Trust Land be excluded from the transaction; and

(c) the first respondent's money totalling RM1,910,616.35 deposited with William Liaw be paid to various recipients without any instructions or authorisation from the first respondent,

sufficiently showed that not only that the first appellant could unilaterally exercise his power and discretion but also that it had the effect on the first respondent's interest by exposing the first respondent's vulnerability to the first appellant as the fiduciary holding the power and discretion (*Tengku Abdullah Ibni Sultan Abu Bakar v Mohd Latiff Shah Mohd*).

[31] The evidence presented had more than satisfied the requirements and would make the first appellant the fiduciary of the first respondent. This is because the first appellant clearly had the power and discretion over the sale of the Khoo family lands to the first respondent as he was granted the power of attorney by the Khoo family on 29 September 2003 ('exh EC53–57)'). It is obvious that it was not possible for the first respondent to grant a similar power of attorney to the first appellant, since it was not the owner of the Khoo family's lands. The appellant's contention on this point therefore is totally misconceived. The fact that the first appellant did not have any power of attorney from the first respondent did not mean that the first appellant did not have any discretion, as there were other reasons that had given rise to such discretion. One such reason was that the letter dated 14 February 2005 ('exh B(1)') issued by Tan Sri Harris to the first appellant which was drafted by the first appellant himself and Lau Siew Chiang ('exh E(65–67)') effectively rebutted the appellants' allegation that the first appellant had no discretion on the acquisition of the said lands or purchase price. The letter confirmed Tan Sri Harris' instruction to the first appellant to secure the said lands. The other reason was that the condition that all potential buyers had to deal through the first appellant placed Tan Sri Harris and the first respondent in a vulnerable position and at the mercy of the first appellant irrespective of Tan Sri Harris' status or experience.

[32] Learned counsel for the appellants contended that Tan Sri Harris knew that the first appellant was an agent for the Khoo family and that he continued to act as such until the completion of the transaction. It ought to be emphasised on this point that the uncontroverted fact showed that the first appellant was

appointed as the agent for the first respondent for the purchase of the Khoo family's lands by the first respondent's letter dated 11 May 2005. Since the first appellant had accepted his appointment as the agent of the first respondent for the purchase of the Khoo family's lands vide the letter dated 11 May 2005, it is factually and legally incorrect to say therefore that the first appellant continued to act for the Khoo family until the completion of the transaction, as alleged by the appellants. The first appellant had testified that he was appointed by the Khoo family and the HSBC Bank as the joint co-ordinator for the sale of the Khoo family's lands. However, the first appellant could no longer be acting for the Khoo family, after 11 May 2005 when he was appointed as the agent for the first respondent for the purchase of the Khoo family's lands. In any event, any legal relationship between the first appellant and the Khoo family had lapsed when the power of attorney which was granted by the Khoo family to the first appellant had expired on 31 October 2004 without any renewal.

[33] The first appellant was clearly in a fiduciary relationship with the first respondent and therefore was obliged to act in a single-minded loyalty to the first respondent. As a fiduciary, the legal obligations of the first appellant to the first respondent arose by the operation of law on fiduciary without the necessity for any written undertaking from the first appellant.

Moreover, as the first appellant was entrusted with a specific purpose to purchase the Khoo family's lands and when he signed on the letter dated 11 May 2005 accepting his appointment as the agent of the first respondent, he had bound himself to act for the first respondent with loyalty and to protect or advance the interest of the first respondent. The first appellant had also admitted in his witness statement that he would not be paid by the Khoo family, instead he would recover his commission from the buyer (see his answer for Q9). Dato' John Khoo had also testified that the Khoo family did not promise to pay commission to the first appellant but that his fees were to be taken care of by HSBC Bank. In *Boardman and another v Phipps* [1966] 3 All ER 721 the House of Lords had held that a solicitor and one of the beneficiaries of the trust were in fiduciary relationships with the trust, just by virtue of the proxies from the trust appointing them to attend the annual general meeting of a company in which the trust had owned minority share. In the instant case, the evidence is overwhelmingly in support of the learned judge's finding that the first appellant was a fiduciary of the first respondent for the specific purpose of purchasing the Khoo family's lands.

[34] As a fiduciary, the law on fiduciary imposes on the first appellant strict duty in his legal relationship with the first respondent, who was his principal for the specific purpose of acquiring the Khoo family's lands. Millet LJ in *Bristol and West Building Society v Mothew,* had set out the legal obligations of a fiduciary at p 712 as follows:

> The distinguishing obligation of a fiduciary is the obligation of loyalty. The

> principal is entitled to the single-minded loyalty of his fiduciary. The core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but is sufficient to indicate the nature of fiduciary obligation.

In *Regal (Hastings) v Gulliver,* Viscount Sankey at p 381 said that the general rule of equity was that no one who had duties of a fiduciary nature to perform was allowed to enter into engagements which he had or could have a personal interest conflicting with those whom he was bound to protect. Further, in the same case Lord Cranworth at p 382 said:

> A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it's a rule of universal application that no one having such duties to discharge shall be allowed to enter into any engagements in which he has, or can have a personal interest conflicting, or which may conflict, with the interest of those whom he is bound to protect.

[35] In *Gurbachan Singh Bagawan Singh v Vellasamy Pennusamy,* the Federal Court said at pp 801 and 807 (MLJ); pp 747 and 753 (CLJ):

> [69] it is trite law that a person in a fiduciary position is not entitled to make a profit and he is not allowed to put himself in a position where his profit and his duty are in conflict.
>
> Thus, the rule of equity is that if a person obtains a profit from his fiduciary position he is accountable for that profit. The liability arises from the mere fact of a profit having been made and the fiduciary, however honest and well intentioned, cannot escape the risk of being called to account.
>
> In this case the purchasers had entrusted the first appellant to get their portion of the estate land for them. Instead the first appellant took advantage of his position as fiduciary. He was entrusted after he managed to convince the purchasers during the meeting before the second auction, to bid for the estate land in his own name but only subsequently claim that he did it on his own accord. Having obtained the whole estate he transferred it to his company, the fourth appellant.
>
> The first appellant was in breach of his fiduciary duty. In so doing he had unjustly enriched himself. Hence, we hold that the first appellant must account for the profit and other advantages he acquired while acting in breach of his obligations towards the purchasers. It would be unconscionable to allow him to keep the profit and other advantages he made as a result of his acquisition of the estate land.

The authorities cited above clearly state that a fiduciary must act to protect the interest of his principal when executing the task entrusted to him. Thus, in *Halsbury's Laws of Malaysia* paras 450–209, it reiterates the obligation of a fiduciary as follows:

A The first duty of a fiduciary, and this may be the only invariant fiduciary duty, is to act in the best interest of the principal in the sense of acting impartially and for the purposes for which is authorised to act.

B **[36]** The appellants alleged that the learned judge had misdirected himself when he had held that the fiduciary obligations of the first appellant, Diana Lai and Lau Siew Chiang was to ensure that the first respondent received all the nine parcels of land including the Trust Land which it had paid for. They said the learned judge had misdirected himself because:

C (a) the letter of appointment dated 11 May 2005 ('exh B(2)'), appointed the first appellant to acquire only six parcels of land;

(b) the documentary evidence clearly showed that what was offered to PW1 Tan Sri Harris by the first appellant was only six parcels of land;

D (c) the purported information memorandum dated circa December 2003 had only referred to six parcels of land;

(d) the printed note ('exh E(63)') had referred to six parcels of land;

E (e) the letter of offer dated 14 February 2005 ('exh B(1)') signed by Tan Sri Harris had referred to only six parcels of land; and

(f) the letter from William Liaw dated 13 June 2005 ('exh B(9–11)') had offered Tan Sri Harris only six parcels of land.

F **[37]** It was not refuted by the appellants that except for the 8 acres out of the Woodford Estate, that was donated to the Beaufort Middle School, the Khoo family was selling all the nine parcels of land. Dato' John Khoo had also testified that the first appellant's mandate was to sell all the nine parcels of land. Tan Sri Harris ('PW1'), the alter ego of the first respondent had indicated as
G early as late 2003 that he intended to buy the Khoo family's lands at Beaufort. PW5 in his statement had also stated that the first appellant told him that Tan Sri Harris had agreed to buy the nine parcels of land. It was also an irrefutable fact that the Khoo family was paid for the nine parcels of land from funds
H belonging to the first respondent. William Liaw the solicitor in charge of the transaction had confirmed that the payment of RM19.56m to the Khoo family was for the acquisition of the nine parcels of land. Tan Sri Harris had denied ever seeing the alleged information memorandum dated circa December 2003 during the course of the transaction. He said that he first saw the information
I memorandum when Diana Lai had attached it to her memorandum dated 12 May 2011 ('exh E(289–293)'), to clarify the issues relating to the purchase of the Khoo family's land, following the discovery of the construction of shop houses on part of the Trust Land by the seventh defendant. Dato' John Khoo also said that he could not tell if the information memorandum was true.

[38] We are fully aware that there was no documentary evidence showing that Tan Sri Harris was offering or was offered to purchase nine parcels of land. However, the absence of any such documentary proof is, in our opinion, irrelevant to determine the extent of the first appellant's duty. What is more pertinent to the true issue before this court is the status or position of the first appellant as a fiduciary of the first respondent and the nature of the duty imposed on him by the law. The fiduciary relationship between the first appellant and the first respondent, as clearly manifested in the evidence, arose from the letter of 14 February 2005 ('exh B(15)') issued by Tan Sri Harris to the first appellant which confirmed the former's instruction to the latter to purchase the said lands and the letter of appointment issued by the first respondent dated 11 May 2005 ('exh B(2)') appointing the first appellant as its agent to purchase the said lands. Dato' John Khoo denied that he had ever seen the letter dated 14 February 2005 ('exh B(15)') nor the letter dated 13 June 2005 ('exh B(9–11)') issued by William Liaw offering on behalf of the second respondent to sell the six parcels of land to Tan Sri Harris. Dato' John Khoo also said that William Liaw never consulted him for the issuance of the said letter. It is a significant point to mention at this juncture that at the trial, the appellants failed to adduce any evidence to prove that the first appellant either had the rights or was duly authorised by the Khoo family to exclude the Merpati Lands and the Trust Land from the sale to the first respondent. Dato' John Khoo also categorically denied that the Merpati Lands and the Trust Land were excluded from the sale to the first respondent. The evidence showed that the first respondent had paid the purchase price of RM19.56m for the nine parcels of land. Additionally, William Liaw's letter of 13 June 2005 ('exh B(9–11)') was also clearly part of the fraudulent manipulation engineered by the first appellant, Diana Lai and Lau Siew Chiang to divert the Merpati Lands and Trust Land from the first respondent. Further, Tan Sri Harris had testified that the first appellant had repeatedly assured him that the Khoo family would sell to him all the nine parcels of land except for the 8 acres donated to the Beaufort Middle School.

[39] The respondent's case, as found by the learned judge, was based on breach of fiduciary duties and not on a breach of contract. Reproduced below is the relevant excerpt of His Lordship's grounds of judgment:

> As for Kebun Rimau Sdn Bhd's claim on the Merpati Lands and Trust Land, Lee Hark Lam simplistic answer was that only six parcels of land minus the Trust Land were up for sale as per letters of offer by Tan Sri Harris and the agreement was signed between the parties. However, this answer misses the central point that the case is not based on breach of contract but breach of fiduciary duty.

Based on the foregoing reasons, the learned judge was therefore correct to have ignored all the documents cited by the appellants in their submission as highlighted above as the first appellant had owed the fiduciary duty to ensure that the first respondent would have received all the parcels of land that the

Khoo family were selling. We are satisfied therefore that, on a critical examination of the evidence and after duly considering the case authorities cited earlier, the first appellant was clearly duty bound to protect the first respondent's interest in the nine parcels of lands the Khoo family was selling. This fact had not been convincingly refuted by the appellants. It is abundantly clear, in our judgment, that the learned judge did not misdirect himself in holding that the extent of the first appellant's duty had encompassed all the nine parcels of land the Khoo family was selling which in turn were paid for by the first respondent.

DID THE FIRST APPELLANT BREACH HIS FIDUCIARY DUTIES

[40] The respondents submitted that the first appellant was in breach of his fiduciary duty when he had acted in concert with Diana Lai and Lau Siew Chiang to cause the Merpati Lands and the Trust Land to be diverted to Merpati Bernas, then subsequently the Trust Land to himself and ultimately to the second and third appellants. The evidence plainly showed that after having engineered the first respondent to pay for all the nine parcels of lands the Khoo family was selling, the first appellant then fraudulently engineered the Merpati Lands and the Trust Land to be diverted to Merpati Bernas for free. The first appellant then caused the Trust Land to be transferred to himself and finally to the second and third appellants.

[41] The first appellant, in our judgment, was clearly in breach of his fiduciary duty as he had not only failed to protect the first respondent's interest but had in fact deliberately acted against the first respondent's interest by fraudulently diverting to Merpati Bernas the Merpati Lands and the Trust Land that the first respondent had paid for. For the reasons alluded to earlier, the appellants' denial that the first appellant was in breach of his fiduciary duty and the assertion that the first appellant's fiduciary duty was limited to only the six parcels of land which had also purportedly been discharged when the first respondent had received the six parcels is groundless and wholly unmeritorious. On the contrary, it was because there was no actual direct contact or dealing between the actual seller and buyer that the first appellant, with the active assistance of Diana Lai and Lau Siew Chiang, was able to hatch the fraudulent scheme and to successfully divert the Merpati Lands and the Trust Land from the first respondent.

[42] It would be an inevitable conclusion that the first appellant would not have succeeded or even able to commence with the fraudulent scheme if Diana Lai and Lau Siew Chiang did not actively participate in the scheme. In this regard, the printed note dated 20 January 2005 ('exh E(63)') bore the note from the first appellant to Diana Lai and Lau Siew Chiang on how to engineer the diversion of the Trust Land from the first respondent. It was based on this

printed note that the learned judge had correctly found that the first appellant was the mastermind of this fraudulent scheme. Diana Lai had testified that the written note which had stated that the brief note was from the first appellant was Lau Siew Chiang's hand writing. Lau Siew Chiang did not refute or deny that it was his handwriting on the said printed note. The first appellant also did not deny that it was he who had issued the said printed note. Further, it is also undeniable that the said printed note had also clearly established that the first appellant, Diana Lai and Lau Siew Chiang had conspired and had acted in concert in the fraudulent scheme to divert the Trust Land from the first respondent.

[43] It is also an irrefutable fact that the said printed note had clearly corroborated the evidence of Tan Sri Harris that the first appellant, Diana Lai and Lau Siew Chiang had subsequently told him that the Khoo family had excluded the Trust Land from the sale as they wanted to build houses for their ex-employees. Tan Sri Harris had also testified that at that time, there was no reason to doubt the first appellant and Diana Lai because the misrepresentation was made to him repeatedly by the first appellant, a former branch manager of HSBC Bank, a reputable International Bank and it was also told to him by Diana Lai, his most trusted aide of 37 years. It was also in his evidence that after he had accepted the said false representation, the first appellant, Diana Lai and Lau Siew Chiang then told him that the Khoo family had imposed a further condition in that the nine parcels of land had to be transacted through the second respondent. Tan Sri Harris added that they also told him that the second respondent was the Khoo family's company.

[44] Dato' John Khoo in his evidence had also said that the second respondent was the special purpose vehicle to transfer the nine parcels of land to the eventual buyer. He later also said that the eventual buyer was Tan Sri Harris. However, as found by the learned judge the actions of the first appellant assisted by the Diana Lai, Lau Siew Chiang and William Liaw, were deliberately engineered to deceive Tan Sri Harris and the first respondent in order to fraudulently divert the Merpati Lands and the Trust Land from the first respondent. His Lordship said:

> Lee Hark Lam had also told the court that because of the problem of bankruptcy of one of the brothers of Dato' John Khoo, he thought it was best to 'unify' the ownership of all the Khoo family lands under one owner, namely Prosper Lane Sdn Bhd. He said he consulted William Liaw who agreed. He said Dato' John Khoo had also agreed. In the premises, Prosper Lane Sdn Bhd should merely have been special purpose vehicle to purchase all the Khoo family's lands to re-sell the lands to Kebun Rimau Sdn Bhd. In fact, Lee Hark Lam told the court that was the very purpose his sale/marketing team acquired Prosper Lane Sdn Bhd as a dormant company. However, from the evidence that I summarised earlier, it is clear that he manipulated to get Kebun Rimau Sdn Bhd to pay for all nine parcels of land and then sell all the issued shares of Prosper Lane Sdn Bhd which then held only six

parcels of land minus the Trust Land. When William Liaw on behalf of Prosper Lane Sdn Bhd wrote to Kebun Rimau Sdn Bhd on 23 June 2005 referring to the earlier offer by Sejati Sdn Bhd to purchase six parcels of land, Diana Lai immediately agreed to the purchase the following day. Since Tan Sri Harris had already written to Dato' John Khoo offering to purchase the six parcels of land, it is foreseeable that Tan Sri Harris would make a logical assumption that Prosper Lane Sdn. Bhd. belonged to the Khoo family when he received the letter that William Liaw had written on behalf of Prosper Lane Sdn Bhd offering to sell six parcels of land. Tan Sri Harris was never told that Prosper Lane Sdn Bhd shareholders were the so called members of Lee Hark Lam's 'sales/marketing team'. Similarly Mr Chin Khiam Kong who assisted Lee Hark Lam to sort out matters with the DGI told the court he was led to believe that Prosper Lane Sdn Bhd belonged to Tan Sri Harris. Thus it is clear that Lee Hark Lam had set the stage to carry out his deception and ensure that Kebun Rimau Sdn Bhd would pay for nine parcels of land although the written offer to purchase only six parcels of land. Lee Hark Lam further ensured that Kebun Rimau Sdn Bhd and Tan Sri Harris would be deceived into believing that the other three parcels of land would go back to the Khoo family.

[45] The learned judge had clearly found that instead of protecting the first respondent's interest as required of him by law, the first appellant had deliberately planned, masterminded, manipulated and engineered the fraudulent scheme to divert the Merpati Lands and Trust Land to advance his own interest. The judge's findings were clearly supported by the fact that the first appellant had given three inconsistent reasons in his witness statement as to why the Merpati Lands and Trust Land were excluded from the sale. Firstly in his answer to Q14, the first appellant alleged that after having consulted William Liaw and Dato' John Khoo, it was decided to set aside the 48 acres for his marketing team comprising Wong Fui Fatt, Chen Nam Kong ('DW11') and Teo Lai Heong ('DW9') as that was the surest way to secure the 8 acres donated to Beaufort Middle School. Secondly, in answer to Q15, the first appellant stated that the Merpati Lands were taken out because heavy presence of squatters had become a convenient reason for price resistance and to remove the obstacle to the marketing and sale, his marketing team was told to buy. Thirdly in his answer to Q16, the first appellant claimed that he made the commitment to sell the Merpati Lands and the Trust Land to his marketing team before December 2003. The sale and purchase agreement for the Merpati Lands and the Trust Land between the second respondent and Merpati Bernas was conditional on a firm sale of the six parcels of land. In Q18, the first appellant stated that to overcome the problem related to ownership and documentary procedure it was decided to employ a shell company, the second respondent as a special purpose vehicle.

[46] The first appellant was therefore manifestly in breach of his fiduciary duty as he had been disloyal and unfaithful and had blatantly acted against the first respondent's interest by having fraudulently diverted the Merpati Lands and the Trust Land to Merpati Bernas for free by way of a sale and purchase

agreement dated 24 August 2005 ('exh C(358–371)') and memorandum of transfer on the same date ('exhs C(376–382), (383–389) and (390–397)'). The first appellant with the assistance of Diana Lai, Lau Siew Chiang and William Liaw then caused Merpati Bernas to transfer the Trust Land to the first appellant on 9 February 2009 and then from the first appellant to the second and third appellants on 10 November 2009. We are entirely in agreement with the learned judge when His Lordship made the following findings:

> Therefore, as long as it is proved on a balance of probabilities that Diana Lai, William Liaw, Lau Siew Chiang and Lee Hark Lam whom I found to be fiduciaries, had failed to protect the interests of their principal by profiting from the transaction or by permitting other to do so, the burden of proof is discharged. In my opinion, the evidence clearly establishes that Lee Hark Lam had flagrantly breached his fiduciary duty to Kebun Rimau Sdn Bhd or Tan Sri Harris by deliberately committing several acts of concealment and misrepresentation with the end result that the Merpati lands and Trust land ended with the fourth, fifth, and sixth defendants. I find that it is proven that he was assisted in this scheme by Diana Lai, Lau Siew Chiang and William Liaw. It is my finding that Lee Hark Lam was the 'mastermind' who had engineered a complicated transaction whereby Kebun Rimau Sdn Bhd would pay for all the nine parcels of land and related expenses including legal fees and subdivision fees but would end up with only six parcels of land. I find there is direct and inferential evidence to support this conclusion.

[47] The appellant had alleged that the learned judge had failed to properly evaluate and consider the evidence presented before him when making his findings. Similarly, the appellant had also alleged that the learned judge had wrongly accepted the evidence given on behalf of the respondents and rejected most of the evidence of the first appellant. These allegations are plainly untrue and devoid of any merits. The learned judge had the advantage of observing and hearing all the witnesses who appeared before him and was also able to observe their demeanour. His Lordship was therefore in the position to determine which of the evidence presented to him was more believable, credible or acceptable. The learned judge as the trier of fact had assessed the credibility of PW1 and PW2 as well as other witnesses who testified for the respondents and found them to be credible and worthy of belief. Unless there is good and cogent reasons and we find there is none, the acceptance of their evidence by the learned judge should be maintained.

[48] For the reasons stated above, the learned judge clearly did not err either on the facts or law in finding that the first appellant was in breach of his fiduciary duties to the first respondent.

THE RELIEFS

[49] The learned judge on delivering his judgment on 14 February 2013, but before the full of text of the judgment was rendered, had stated that he had

granted judgment as prayed. However, before the court, learned counsel for the appellants quite candidly conceded that as the Merpati Lands and the Trust Land were traceable to their original state (including the sale proceeds of RM17m of the 17 acres of the Trust Land sold to the seventh defendant) and were secured by several caveats and a consent order respectively, all the alternative reliefs granted by the learned judge had clearly become redundant. It was becoming obvious, learned counsel added, that if the respondents fully recovered all the Merpati Lands and the Trust Land (including the sale proceeds of RM17m), the respondents would no longer be legally entitled to enforce any of the alternative reliefs granted by the learned judge. For instance, the relief orders on damages and account of profits against the first appellant, Diana Lai and Lau Siew Chiang had become redundant and no longer applicable. It was therefore submitted that as the reliefs prayed for were in the alternatives, their actual application or enforcement would no longer be applicable as the respondents would recover the Merpati Lands and the Trust Land. Learned counsel accordingly correctly conceded that, in the event the appeals were dismissed our order should be confined to prayers 1(a), 2(a) to (c), 3(a) and (b) and 4 only.

[50] The evidence had clearly shown that the purchase price for the Khoo family's nine parcels of land amounting to RM19.65m was wholly paid from the funds belonging to the first respondent but the first respondent had ended up with only six parcels less the Merpati Lands and the Trust Land. The learned judge was correct therefore to have awarded the Merpati Lands and the Trust Land to the respondents and there was clearly no error in the learned judge's judgment. It will be recalled that the evidence which we gleaned from the record of the proceedings showed that the first appellant had used the second respondent and Merpati Bernas to divert the Merpati Lands and the Trust Land from the first respondent. As the evidence would further show, the second respondent transferred the Merpati Lands and the Trust Land to Merpati Bernas. We are satisfied that, after considering the evidence, Merpati Bernas was not a bona fide purchaser for value of the Merpati Lands and the Trust Land as the same were transferred to Merpati Bernas on 24 August 2005 due to the breach of fiduciary duties by the first appellant, Diana Lai and Lau Siew Chiang. Since Merpati Bernas had not obtained any good title to the Merpati Lands and the Trust Land, they could not have thereafter legally transferred the Trust Land to the first appellant on 1 August 2008. Consequentially, the first appellant could not likewise transfer any good title of the Trust Land to his sons namely the second and third appellants. In the meanwhile, the Merpati Lands remained with Merpati Bernas since it was diverted from the second respondent.

[51] The appellants had alleged that the purchase price of RM220,000 was paid by Merpati Bernas for the Merpati Lands and the Trust Land. To prove this

payment, the appellants merely relied on the audited accounts of the second respondent dated 31 December 2005 produced internally which showed no outstanding amount was due from any one to them. The appellants had also called Teo Lai Heong ('DW9') and Chen Nam Kong ('DW11') who were the shareholders of the second respondent. They had alleged that the purchase price of RM220,000 was paid by way of a set off by them against the same amount owing by the second respondent to them and the late Wong Fui Fatt, another shareholder of the second respondent. However, both of them did not adduce any evidence to prove the existence of the alleged debt nor provide any detail of what the debt was for. The learned judge was therefore absolutely correct to have rejected their evidence on that score. Both witnesses, together with the late Wong Fui Fatt, made a statutory declaration dated 30 August 2006 declaring and affirming that they have no claim whatsoever against the second respondent. On the contrary, the second respondent's audited accounts ended 31 December 2006 showed that the sum of RM220,000 owed by Merpati Bernas to the second respondent was written off as bad debts. This documentary evidence was supported by Yong Kok Yung ('PW6') who was the second respondent's auditor.

[52] Yusni @ Rusdie bin Alibasa ('PW7') who was a shareholder cum director of Merpati Bernas had testified that Merpati Bernas had no bank account nor was he aware that Merpati Bernas had paid any money to the second respondent. The learned judge, in our judgment, had correctly found that Merpati Bernas had not given any value for acquiring the Merpati Lands and the Trust Land. Merpati Bernas could not have obtained any good title to the Merpati Lands and the Trust Land because it became the registered owner following the breach of fiduciary duties by the first appellant, Diana Lai and Lau Siew Chiang owed to the first respondent. The learned judge was therefore correct to have found Merpati Bernas to be holding as constructive trustee the Merpati Lands and the Trust Land for the first respondent.

[53] After the Trust Land was subdivided and issued with a new title deed CL 175346684, Merpati Bernas purportedly sold it to the first appellant for the sum of RM240,000 on 1 October 2008. Teo Lai Heong ('DW9') and Chen Nam Kong ('DW11') had once again alleged that this said sum was paid by another alleged set off. They testified that Merpati Bernas had owed the late Wong Fui Fatt the alleged sum of RM220,000 for an alleged loan. They also alleged that the first appellant had paid the late Wong Fui Fatt the said sum of RM220,000. Hence, it was the appellants' contention that the purchase price of RM240,000 owing by the first appellant to Merpati Bernas was therefore paid by this set off. We pause here to observe that both of them did not adduce any evidence to prove the existence of the loan nor did they say what the loan was for. However, the first appellant contradicted Teo Lai Heong ('PW9') and Chen Nam Kong ('PW11') when he said during cross-examination that he had

paid Merpati Bernas the sum of RM240,000 for the Trust Land. The first appellant however, did not adduce any evidence to prove that he had paid the said sum. We agree with the learned judge that this transaction was a sham as there was no evidence to show that this sum was even paid by the first appellant to Merpati Bernas. Additionally, we discern no such transaction from the audited account of Merpati Bernas for the year ending 31 August 2008. As the first appellant had caused the Trust Land to be transferred to himself, he had clearly put himself in conflict with the first respondent's interest and was clearly in breach of his fiduciary duty (*Boardman v Phipps* and *Regal (Hastings) v Gulliver*).

[54] The learned judge, we find, was correct in his finding that the second and third appellants as well as Merpati Bernas were constructive trustees as they had not given any consideration or value for acquiring properties that were spirited away through the breach of fiduciary duties by the first appellant, Diana Lai and Lau Siew Chiang. His Lordship was also correct in holding that the Merpati Lands and the Trust Land could be recovered by the respondents by the remedy of 'tracing and following'. As the first appellant had transferred the Trust Land to the second and third appellants for the consideration of love and affection, the learned judge was correct to have held that the second and third appellants were holding the Trust Land as constructive trustees for the first respondent. In *Foskett v McKeown and others* [2001] 1 AC 102, the House of Lords allowed the plaintiffs to trace and follow their money into the monies paid out under a life insurance policy in order to ascertain what happened to the plaintiff's money. Lord Millet said as follows:

> The process of ascertaining what happened to the plaintiffs' money involves both tracing and following. These are both exercises in locating assets which are or may be taken to represent an asset belonging to the plaintiffs and to which they assert ownership. The processes of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand.
>
> Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner.
>
> A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds every one who takes the property or its traceable proceeds except a bona fide purchaser for value without notice It similarly binds his successors, the trustees of the children's settlement, who claim no beneficial interest of their own, and Mr Murphy's children, who are volunteers. They gave no value for what they received and derive their interest from Mr Murphy by way of gift.

In *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2)* [2010] 2 MLJ 181; [2010] 1 CLJ 381 the Federal Court said as follows:

(4) ... In breach of her fiduciary duties, the first respondent acquired the property and registered it in the sole name, sold it to the second respondent at a higher price and then denied the appellant's right to half share in the property. The first defendant was clearly guilty of equitable fraud in relation to appellant's interest in the land.

(5) ... If a trustee or other fiduciary acquire property in breach of trust or by means of other unconscionable conduct, he or she holds it as constructive trust for the true beneficiary. In the instant case, the fact pattern of the appellant's case fell squarely within the parameters of a constructive trust.

[55] Based on the foregoing reasons, we agree with the learned judge that by the process of 'following' and 'tracing', the second and third appellants' entitlement of RM17m or the equivalent of 31 units of completed shop houses and Merpati Bernas' holding of the Merpati Lands were trust properties that the respondents were entitled to by virtue of the breach of fiduciary duties by the first appellant, Diana Lai and Lau Siew Chiang. The appellants should therefore be compelled to return them to the respondents.

[56] The appellants had contended that the learned judge had wrongly ordered the first appellant, Diana Lai and Lau Siew Chiang to pay the first respondent the sum of RM1,910,616 and should be set aside because they said that the learned judge completely ignored the evidence of William Liaw and the supporting documents evidencing payments issued by William Liaw to the Khoo family or on their behalf out of the RM1,910,616. We are of the opinion that, contrary to the appellants' allegation, the learned judge was correct to have ignored the evidence of William Liaw and the supporting documents evidencing payments to the Khoo family and on their behalf. It was obvious that his evidence was tainted as the learned judge had found him in complicit in the first appellant's fraudulent scheme. His Lordship also found that William Liaw had confirmed that after paying the Khoo family and the DGI under the three sale and purchase agreements from the funds of the first appellant, there was a balance of RM2.65m. Taking into account the payment of stamp duties legal fees, subdivision and survey fees, there was a balance of RM1,910,616.35 which according to the learned judge, was unaccounted for in the account rendered by William Liaw. The learned judge in this regard, was correct to have awarded to the first respondent damages of RM1,910,616 to be payable by the first appellant, Diana Lai and Lau Siew Chiang because as testified by William Liaw, all the payments were authorised by the first appellant.

[57] William Liaw had also alleged that all the payments out of the RM1,910,616 were made to Wong Fui Fatt ('the deceased') and to the Khoo brothers namely Dato' John Khoo and Datuk Peter Khoo. However, we observe that William Liaw had only produced during the trial photostat copies of cash cheques which only amounted to RM1,505,366.35. The cheques do

not tally with the amounts stated in two payment vouchers that were allegedly signed for by Wong Fui Fatt which was RM1,901,316.55. In our judgment, the learned judge did not commit any error when he did not take into account the alleged payments made to Dato' John Khoo and Datuk Peter Khoo. Our finding is premised on the fact that the action is clearly against the first appellant, Diana Lai and Lau Chiew Siang for breach of fiduciary duty and the claim against them for the said sum of RM1,910,616 is in their capacity as fiduciaries. The first appellant should thus have joined the Khoo brothers as third parties to the action to seek contribution, if his allegation is true that the Khoo brothers were wrongly paid the said sums.

[58] The bottom line is that the evidence adduced showing that the first respondent had lost the said sum of RM1,910,616.35 was unchallenged by the appellants. The said sum, in truth, was held by William Liaw in his clients' account and which was under the control of the first appellant. The first appellant was therefore liable for this loss as he had failed in his duty to protect the first respondent's interest by causing the first respondent's funds to be dissipated. It is indisputable that based on the three sale and purchase agreements executed between the Khoo family, the DGI and the second respondent the purchase price for the nine parcels of land was RM19.56m. We are mindful that the first respondent had deposited with William Liaw the sum of RM22.21m out of which the sum of RM19.56m was paid for the purchase of the land. Hence, the appellants' allegation that the payment of RM1,910,616 that was ordered to be paid to the first respondent had in fact and in law amounted to a reduction of the purchase price is clearly fallacious. On the contrary, the evidence had shown that the said sum of RM1,910,616 was clearly the excess amount of the money belonging to the first respondent which should have been refunded by William Liaw to them. The sum was lost and unaccounted for as a direct consequence of the breach of fiduciary duties owed by the first appellant, Diana Lai and Law Siew Chiang to the first respondent.

[59] With regard to the appellants' submission that the learned judge had failed to consider the sum of RM2m that was paid to the first respondent pursuant to the consent order dated 9 January 2012, our answer to this point is simply that this payment was clearly made in consideration of the first respondent agreeing to lift the caveat against the 17 acres of the Trust Land that was sold by the appellants to the seventh defendant. This arrangement had no connection at all with this dispute between the appellants and the respondents. In our judgment, the learned judge was absolutely correct to have ignored this arrangement between the first respondent and the seventh defendant under the said consent order of 9 January 2012. The learned judge was also correct to award to the respondents damages of RM1,910,616.35 as it was supported by the evidence adduced at the trial. This was what the learned judge said:

> William Liaw confirmed that after paying the Khoo family and DGI under the said three sale and purchase agreement from funds of Kebun Rimau Sdn Bhd, there was a balance of RM2.65m. The plaintiffs have proved through the evidence of Peter Foo that after taking into account payment of stamp duties, legal fees, subdivision and survey fees, there was a balance of RM1,910,616.35 which was unaccounted for in the accounts rendered by William Liaw. As William Liaw took instructions from Lee Hark Lam, Diana Lai and Lau Siew Chiang and that it is proved that they were behind Prosper Lane Sdn Bhd, it can be presumed that the said amount was siphoned off by them. I hold that the plaintiffs are entitled to recover the sum of RM1,910,616.35 from Lee Hark Lam, Diana Lai and Lau Siew Chiang.

[60] The evidence of William Liaw proved that after paying for the purchase price for the nine parcels of land, the stamp duty, legal costs and other expenses there was a balance of RM1,910,616 left from the first respondents funds held by him. This said sum was never refunded to the first respondent but was unaccounted for. Hence, the first appellant, Diana Lai and Lau Siew Chiang as joint tortfeasors were therefore liable for the loss of RM1,910,616 suffered by the first respondent. The learned judge had clearly awarded the damages to the respondents in accordance with the evidence and law and therefore the appellants' allegation that he had acted mechanically is, totally baseless and untrue. The first appellant was therefore liable to compensate for the loss that he had caused the first respondent to have suffered. In *Tengku Abdullah*'s case, this court said:

> In Phelan, Judge Learned Hand, in discussing the nature of the conflict that gives rise to the fiduciary's liability to account said (at p 602):
>
> Was that such a conflict as invokes the doctrine? It enables the beneficiary to hold the fiduciary liable for any profits he may make, or losses he may cause, in order to deprive him of any inducement that will affect his absolute and disinterested loyalty ...

[61] As stated earlier the reliefs prayed for had consisted of alternative reliefs to provision for the likely situation where the first appellant, Diana Lai and Lau Siew Chiang had sold the trust properties, namely the Merpati Lands and the Trust Land to third parties and converted the proceeds therefrom into other traceable assets. However, since the Merpati Lands and the Trust Land had not been converted to other assets, obviously the first respondent was only entitled to claim these trust properties in the custody of the second and third appellants and the Merpati Bernas as constructive trustees for the first respondents. In addition, the first respondent was also entitled to recover from the first appellant, Diana Lai and Lau Siew Chiang, the said sum of RM1,910,616 being balance of its monies held by Messrs William Liaw, Chan & Co in connection with the acquisition of the Khoo family's lands which were lost and unaccounted for. Save for the Merpati Lands and the Trust Lands which were stolen trust assets and the first respondent's monies in the said sum of RM1,910,616, there was nothing more that the respondents could recover

based on the reliefs prayed for. Thus, contrary to the appellants submission, for all the reasons stated above, there was no error in the judgment of the learned judge and that there was no basis to set aside the relief orders that he had granted which are enforceable save the alternative reliefs granted by the learned judge which, as learned counsel for the respondent rightly conceded, had clearly become redundant.

LIMITATION

[62] It was urged for the appellants that the learned judge had erred in law and in fact when His Lordship held that the respondents' action was not time-bared. The learned judge in this regard had correctly found that the respondents' cause of action was grounded on the breach of fiduciary duties as such His Lordship had correctly construed and concluded that the respondents' action was governed by Item 97 of s 3 of the Limitation Ordinance (Cap 72). Item 97 prescribes that the period of limitation for suit for which no period of limitation is provided elsewhere in the Schedule is six years with the period to begin to run when the right to sue accrues. As there is no specific item in the Schedule prescribed for breach of fiduciary duty, it therefore comes under Item 97.

[63] Contrary to the appellants' contention, the learned judge correctly determined that the commencement date of the limitation period was from February 2011. The determination was based on the unchallenged testimony of Tan Sri Harris ('PW1'), Halijah bt Harris ('PW8'), Mohd Hapiniah bin Osman ('PW10') and Hj Mohamad Ali bin Ab Jabar ('PW11'). They said that they only came to know circa February 2011 of the construction of the shophouses on the Trust Land. Hence the date when the respondents became aware that the Merpati Lands and the Trust Land did not remain with the Khoo family and that the first appellant had in breach of his fiduciary duties diverted the Trust Land from the first respondent. This was after the first appellant together with Diana Lai and Lau Siew Chiang had misled Tan Sri Harris into believing that the Trust Land was not for sale as the Khoo family purportedly wanted to retain it in order to build houses for their ex-employees. The above evidence was corroborated by the date of the approval from the Beaufort District Council for the development plan for the development on part of the Trust Land CL 0175346684 which was on 1 July 2010 ('exh D(689–696)'). This showed that the construction of the shophouses could only have commenced after 1 July 2010 thereby proving that the respondents cause of action was well within the limitation period of six years.

[64] We were pressed by counsel with the argument that the respondents' action came within Items 72 and 77 of the Schedule. Such contention is, in our opinion, clearly misplaced for it is beyond question that these two items are

concerned with agency and fraud actions whereas the respondents' claim as correctly found by the learned judge was founded on fiduciary duty which is under Item 97 of the Schedule. Even if Items 72 and 77 were to be used, the respondents' action was still filed within the three year period starting from February 2011. The writ of summons and statement of claim was filed on 7 July 2011. We accordingly cannot accede to the argument urged for the appellant on this issue.

CONCLUSION

[65] The appellants' grounds of appeal are without merits and contrary to the facts and evidence adduced at the trial. We do not find any reason to interfere with the findings of facts made by the learned judge that the first appellant was in breach of his fiduciary duty in that he failed to discharge that duties to act loyally in the first respondent's interest and he had acted in bad faith and had failed to protect the first respondent's interest when he had engineered with Diana Lai and Lau Siew Chiang to wrongfully divert the Merpati Lands and the Trust Land to the third parties. The first appellant together with Diana Lai and Lau Siew Chiang had indeed hatched up the scheme through their web of deceptions and lies which almost unmistakeably ended in perfect execution of the same. However, their tangled web of lies were eventually unravelled when the fraudulent scheme was discovered.

[66] As all the above findings were based on judicial appreciation of evidence by the learned judge, we find no legal basis to set aside the judgment of the High Court given on 14 February 2014. The conclusion reached by the learned judge was not unreasonable, it was instead supported by clear and overwhelming evidence. The grounds relied on by the appellant in these appeals fail to satisfy the legal threshold set by this court in *APV Hill & Mills (M) Sdn Bhd v AQ-Pacific Wide Sdn Bhd & Anor* [2006] 3 MLJ 235 that, in order to succeed in these appeals, the appellant must show to our satisfaction that the conclusion reached by the court of first instance is so unreasonable that no reasonable tribunal would have come to that conclusion. We affirm the judgment of the High Court which had correctly found the second and third appellants to be holding the Trust Land as constructive trustees. The inexorable and uncomfortable truth which the appellants have to inevitably face is the overwhelming evidence showing the fraudulent transfer of the Merpati Lands and the Trust Land to Merpati Bernas and that Merpati Bernas could not obtain any good title to the same. As such, Merpati Bernas was in no position to pass any good title in respect of the Trust Land to the first appellant in the first place and also because the second and third appellants were not bona fide purchasers as they did not pay for the Trust Land. The documentary evidence showed that the Trust Land was transferred by the first appellant to his sons who were the second and third appellants in these appeals for the consideration of love and affection. In the event, we unanimously dismiss both appeals.

A However, the order of the High Court dated 14 February 2014 is varied to the extent that only prayers 1(a), 2(a), (b) and (c), 3(a) and (b) and 4 of the statement of claim are allowed. We also order costs of this appeal and the second appeal in the sums of RM35,000 and RM10,000 respectively to be paid by the appellants to the respondents. The deposits are refunded to the B appellants.

Both appeals dismissed with costs of RM35,000 and RM10,000 respectively.

Reported by Kohila Nesan

C

D

E

F

G

H

I